On Thin Ice: the Role of the Court of Justice under the Withdrawal Agreement

Tobias Lock 2018-11-15T23:01:43

Bringing “an end to the jurisdiction of the Court of Justice in Britain” was one of Theresa May’s famous red lines in the EU withdrawal negotiations. And judging by the debate in the House of Commons on 15 November, many MPs are of the opinion that the draft Withdrawal Agreement (WA) has failed to respect it. This particular red line was always going to be a problem for the prime minister: After all, the UK’s commitment to comply with certain EU rules (on citizens’ rights, customs etc) would inevitably mean that the ECJ’s interpretations of these rules would have to be binding on the UK. It is thus no surprise that the WA provides for the jurisdiction of the ECJ in various places; what is perhaps more of a surprise – and surely a negotiation win for the UK – is the EU’s concession of an arbitration mechanism to resolve inter-party disputes over the interpretation of the WA.

The aim of this blog post is twofold: first to outline the various questions over which the ECJ will retain jurisdiction after the UK’s withdrawal from the EU; and second to argue that it is doubtful whether the arbitration mechanism is compatible with EU law.

A member state in all but name

Ending the jurisdiction of the ECJ was always going to be a difficult task for the UK’s negotiators if they wanted the EU-UK relationship to be based on common (i.e. in practice EU) rules. After all, Articles 19 TEU and 344 TFEU have been interpreted to result in its exclusive jurisdiction to interpret Union law, at least as far as it takes effect within the Union (more on this later). Given that the WA envisages a standstill transition period – during which the UK will be subjected to EU law like a Member State in all but name – and a “single customs territory” based on Union law for the time after transition, unless a free trade agreement is in place that would avoid a hard border on the island of Ireland a role for the ECJ with effect for the UK was going to be nigh impossible to avoid.

We can therefore find numerous references to a continued role of the ECJ in the UK after Brexit:

1) It goes (almost) without saying that the ECJ’s jurisdiction will continue as it is now during the transition period (Article 131 WA).

But even after transition, the ECJ and its case law will continue to play an important role in the UK. First, its case law up until the end of the transition period will remain

binding on the UK; post-transition case law will have to be given due regard (Article 4 WA).

2) The ECJ will continue to have jurisdiction over cases pending before it when the transition period ends (Article 86 WA) and over new enforcement actions brought within four years after the end of transition provided the UK's violation occurred before then (article 87 WA).

3) As far as the citizens' rights part of the WA is concerned, UK courts will continue to be in a position to refer cases to the ECJ over the interpretation of that part of the agreement for eight years following the end of transition (Article 158 WA).

4) The ECJ will retain jurisdiction over large parts of the Protocol on Northern Ireland (the 'backstop' contained in the Protocol on Ireland/Northern Ireland). According to Article 14 (4) of the Protocol, the ECJ will have jurisdiction (including for preliminary rulings) over the interpretation of EU customs legislation; the rules of the single market in goods as far as they apply under the backstop; VAT and excise rules; agriculture and environment; the single electricity market; and state aid (Articles 8 -12 of the Protocol).

The backstop will apply until the UK and the EU have reached an agreement over their final relationship that will supersede the backstop (Article 1 of the Protocol); or until the Joint Committee decides that the Protocol is no longer necessary (Article 20 of the Protocol). How long this will be the case, is entirely unclear at this moment.

The arbitration problem

While the jurisdiction of the ECJ concerning the UK is highly sensitive politically, it does not pose particular legal difficulties under EU or UK law.

By contrast, the dispute settlement mechanism for disputes between the EU and the UK over the interpretation and application of the WA itself, is more problematic. The default rule in this regard is that disputes should be resolved through cooperation and consultation, which would happen in the Joint Committee (Article 169 WA). Where no agreed solution can be reached, either party to the WA may request the establishment of an arbitration panel. It should be noted that this had not been part of the earlier (Commission) draft of the WA and can be considered a negotiating success for the UK which had been pressing for an arbitration mechanism (instead of the ECJ as the ultimate arbiter).

This construction, however, raises considerable constitutional problems under EU law as it might be incompatible with the autonomy of the EU legal order. The autonomy of EU law – meaning that it is an independent legal order – goes back as far as *van Gend en Loos* and finds its most basic exposition – as far as EU external relations are concerned – in *Opinion 1/91* on the EEA Agreement. The the ECJ ruled that it was generally permissible for an agreement concluded by the EU to provide for its own dispute settlement system, but that there were two specific limits if the agreement was based on and referred to concepts of Union law resulting from

Articles 19 TEU and 344 TFEU: first, only the ECJ is in a position to determine the division of competences between the EU and its Member States; and second, only the ECJ has jurisdiction to interpret EU law if that interpretation is binding in the EU or its Member States.

Given that the WA is to a large extent based on EU law concepts, any dispute resolution mechanism that would allow for an interpretation of these concepts in a way that was binding on the EU, would have to be found contrary to the autonomy of EU law. The drafters of the WA were of course aware of this problem and included Article 174 WA:

> 1. Where a dispute submitted to arbitration in accordance with this Title raises a question of interpretation of a concept of Union law, a question of interpretation of a provision of Union law referred to in this Agreement or a question of whether the United Kingdom has complied with its obligations under Article 89(2), the arbitration panel shall not decide on any such question. In such case, it shall request the Court of Justice of the European Union to give a ruling on the question.
>
> The Court of Justice of the European Union shall have jurisdiction to give such a ruling which shall be binding on the arbitration panel. […]
>
> 2. Without prejudice to the first sentence of the first subparagraph of paragraph 1, if the Union or the United Kingdom considers that a request in accordance with paragraph 1 is to be made, it may make submissions to the arbitration panel to that effect. In such case, the arbitration panel shall submit the request in accordance with paragraph 1 unless the question raised does not concern the interpretation of a concept of Union law, interpretation of a provision of Union law referred to in this Agreement, or does not concern whether the United Kingdom has complied with its obligations under Article 89(2). […]

This provision would seem to preserve the autonomy of EU law by excluding questions of EU law from the jurisdiction of the arbitration panel.

In light of *Opinion 2/13* on the EU's ill-fated accession to the ECHR, one can doubt whether this solution will do the trick. Let's recall that the envisaged prior involvement of the ECJ was one of the (many) reasons the ECJ considered the draft agreement on EU accession to the ECHR to violate the autonomy principle. Under the agreement the European Court of Human Rights (ECtHR) would have had to decide whether to allow the ECJ to render its own prior decision in a case pending before the ECtHR if it had not already had given a ruling on the matter in question. This, the ECJ ruled, was not permissible under the EU Treaties because it "would be tantamount to conferring on [the ECtHR] jurisdiction to interpret the case-law of the Court of Justice."

Even though Article 174 WA does not require consideration of the ECJ's case law, there are obvious parallels in that the arbitral tribunal will have jurisdiction to decide whether Union law is at issue or not. This decision can only be made by interpreting

Union law – at least in a superficial manner; and any such interpretation would be binding on the EU.

As many commentators pointed out after *Opinion 2/13* was released, this conception of the autonomy of EU law is particularly (and unhelpfully) strict and unnecessary. Nonetheless, it stands and the ECJ's recent decision in *Achmea* confirmed the ECJ's strict and defensive stance on all matters concerning its own jurisdiction.

Should this worry the parties to the agreement? No one has yet suggested that the WA be referred to the ECJ under Article 218 (11) TFEU; and anyhow the WA may well not survive the next couple of weeks politically. But even after its entry into force, the ECJ would have jurisdiction to incidentally review the compatibility of any EU international agreement with the Treaties. Whether it will have the courage to strike parts of it down when so much is at stake politically is of course another question.
